IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Petitioner,

v.

UNITED STATES POSTAL SERVICE, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DARRYL J. ANDERSON
ANTON G. HAJJAR
SUSAN L. CATLER
O'DONNELL & SCHWARTZ
1126 - 16th Street, N.W.
Washington, D.C. 20036
(202) 887-5955

GEORGE KAUFMANN
(Counsel of Record)
2101 L Street, N.W.
Washington, D.C. 20037
(202) 296-1294
Attorneys for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

For fifty years, the agencies responsible for administering the Civil Service Retirement Act ("Retirement Act") computed the retirement annuities of postal substitutes (a large class of employees who were subject to call by the post office but were paid only for time actually worked) on the basis of the employee's average annual salary *rate* rather than the pay actually earned. In 1978, OPM abandoned this method by including in the computation only the employee's actual earnings, substantially reducing the retirement benefits of 113,000 employees. OPM so acted on the factual premise that the substitutes are no longer on call, a determination challenged by petitioner in this proceeding to review OPM's action.

The questions presented are:

1. Did the Court of Appeals exceed its power of judicial review as circumscribed by *SEC v. Chenery Corp.*, 318 U.S. 80; 332 U.S. 194, when, treating the "subject to call" issue litigated by the parties as a "mirage", the court affirmed the agency's action on the entirely different and inconsistent ground that, as construed by the court, the Retirement Act requires that the substitutes' annuities be based on their actual earnings even if they are, in fact, still subject to call?

2. Did the Court of Appeals err in so construing the Retirement Act, thereby overturning fifty years of "administrative practice, consistent and generally unchallenged", to which it gave no weight, contrary to *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315 and its progeny?*

---

* The parties to this proceeding, in addition to those named in the caption are: Wilma M. Carter, Marjory E. Watson, Virginia G. Doss and the Office of Personnel Management and its Director, Donald J. Devine.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No.

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Petitioner,

v.

UNITED STATES POSTAL SERVICE, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINION BELOW

The Opinion of the Court of Appeals is reported at 707 F. 2d 548. It is reproduced at pp. 1a-35a of the separately bound Appendix to this petition ("App."). The Memorandum Opinion of the District Court is unreported. It is reproduced at App. 36a-46a.

JURISDICTION

The decision of the Court of Appeals and its Judgment (App. 50a) were issued on May 6, 1983. A timely petition for rehearing and rehearing en banc was denied on July 14, 1983 (App. 52a). On October 3, 1983 the Chief Justice entered an Order extending the time for filing this petition to December 11, 1983. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves the Civil Service Retirement Act as amended, 5 U.S.C. §§ 8331 *et seq.* (1976) (Supp. V, 1981), which is reproduced in pertinent part in the Statutory Appendix, pp. 1b-4b, *infra*.

STATEMENT OF THE CASE

Introduction

As the Court of Appeals said, "The past is truly prologue to this controversy" (App. 2a). It involves the legality of respondents' abandonment of the method used for over fifty years for calculating the retirement benefits of a large class of employees of the United States Postal Service ("USPS") known as "substitutes" or "PTF's" (part-time flexible employees). As the Court of Appeals also observed, "This change [in the method of computation] substantially reduce[s] the expected annuities of some 113,000 future retirees." (App. 2a). It was adopted by the Office of Personnel Management ("OPM")[1] at the behest of USPS on the view that there had been a substantial material change in the working conditions of the substitutes; that position has been challenged in this litigation by petitioner American Postal Workers Union ("APWU"), a labor organization representing approximately 65,000 of these substitutes (Complaint, ¶ 2).

The Court of Appeals did not resolve the foregoing factual controversy or direct a trial for that purpose. Rather, it sustained OPM's change on a ground not urged by any of the parties: The court held that the method for calculating the benefits of these employees had, for

---

[1] In 1978 OPM succeeded to all the rights and duties of the Civil Service Commission ("CSC") in administering the Retirement Act. Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 906(a)(2), (3), 92 Stat. 1111, 1224-25. (App. 6, n.3). Like the Court of Appeals, we will use "OPM" and "CSC" interchangeably.

fifty years, been based on a misinterpretation of the civil service retirement acts; it thereby reversed the uniform understanding of the affected employees, the employers (USPS and its predecessor the United States Post Office Department) and the agencies responsible for administering the civil service retirement system (OPM and its predecessors, the Civil Service Commission ("CSC") and the Secretary of the Interior).

In order to put the questions presented by this petition into context we shall describe the working conditions of these postal substitutes, the previously accepted method for calculating their retirement benefits, and the (highly informal) proceedings by which USPS prevailed upon OPM to change this practice. We shall then describe the instant litigation.

A. The Factual Background

1. Since the nineteenth century the Post Office has employed "substitutes" to do the work of absent employees, because a full complement of postal workers is required at all times to process and deliver mail on a daily basis (App. 3a-4a). In the Court of Appeals' words:

> Postal substitutes were unique in that the time they actually worked was far less than the time during which they had to be available for work. Obviously, the Post Office could not efficiently hire a new worker each time a regular employee was absent on short notice. Thus, the Post Office maintained a pool of acceptable substitute employees, who actually worked only when needed to replace absent regular employees. [App. 4a]

Originally, substitutes were required to physically report for duty at the Post Office ("shape up") two or three times daily. By 1918 they were required to "shape up" in the morning, and wait for work all day and into the evening. By the 1940's, at least, the "shape up" had been eliminated, but the substitutes were required to be

available by telephone if needed to work on short notice (App. 8a). And, as the Court of Appeals recognized, after passage of the Postal Reorganization Act of 1970 ("PRA", codified at 39 U.S.C. §§ 101-5060 (1976, Supp. V, 1981)) the substitutes still had to be available to work on short notice (App. 8a-9a). The record shows this to be true even after OPM's challenged action in 1978 (J.A. 152-185).[2]

2. In 1920 Congress passed the first Civil Service Retirement Act, providing that any eligible employee in the classified civil service could receive an annuity based upon his or her years of federal service and average basic annual salary pay or compensation. Act of May 22, 1920, ch. 195, § 2, 41 Stat. 614, 615. The Commissioner of Pensions, under the direction of the Secretary of Interior, was charged with administration of the statute. § 4, *id.* at 616. Congress provided in the 1920 Retirement Act that in giving a substitute credit for service, the Secretary could include only the amount of time actually worked. § 3, *id.* at 616.[3]

In 1926, a Joint Committee of Congress heard testimony about the predicament of postal substitutes. They were paid a small hourly wage only when they actually worked, which was infrequent and unpredictable. Their income, therefore, was generally not enough to provide a decent living; yet they were unable to secure any additional employment because they had to be available for postal work at all times. It was suggested that substitutes be recompensed for these onerous employment conditions.[4]

---

[2] "J.A." refers to the Joint Appendix in the court below. The Postal Service's continuing practice is illustrated by the discharge of Bonnie Calentine because she had not been at home when called for work by the postmaster in 1979 (J.A. 180-183, 185).

[3] The Civil Service Retirement Act: Joint Hearings Before the Senate and House Committees on Civil Service, 69th Cong., 1st Sess. 63, 66, 68 (1926).

[4] Prior to the enactment of the Postal Reorganization Act of 1970 the Post Office Department employed individuals as substi-

The bill reported by the committee and passed by Congress amended the retirement law to require that a substitute's credited service for the computation of annuities include the entire period of employment as a substitute, regardless of the actual time worked. (Act of July 3, 1926, ch. 801, § 5, 44 Stat. 904, 907.)

The Secretary of Interior thereafter began computing substitutes' annuities on the basis of the employee's average annual salary rate rather than the pay actually earned—a practice which prevailed until the OPM decision at issue here. The exact time when this practice began is not known, and the Secretary apparently did not issue any formal explanation of his reasons therefor. The Secretary did in 1926 issue a formal decision that in the computation of service of substitute postal employees under this new provision, credit should be allowed from the date of the employee's original appointment and "mere failure to perform actual services will not be regarded as equivalent to leave of absence so long as they were *subject to call* for actual service." (*Computation of Service of Substitute Postal Employees*, 22 Decisions Relating to Pensions and Annuities 207 at 208, emphasis added (September 17, 1926)).

3. For over 50 years the retirement benefits of postal substitutes were calculated on the basis of their average annual salary rate. This was an important attraction for these employees, who as late as 1943 were receiving only 65 cents per hour when they worked, and nothing for the time that they were on call.[5] On June 30, 1960, Postmaster General Summerfield wrote a lengthy letter to Chairman Jones of the Civil Service Commission, ask-

---

tute employees in two categories, "career substitutes" and "temporary substitutes". The former, but not the latter, were covered by the civil service retirement law.

[5] See, Classification and Compensation of Substitute Employees in the Postal Service, Hearings on H.R. 2836, *et al.* before the House Committee on the Post Office and Post Roads, 78th Cong., 1st Sess., 10 (1954).

ing that the Commission no longer credit the substitutes for pay not actually earned (J.A. 197-201). The Commission did not act on this letter and the practice was retained.

In 1970, the PRA was passed, creating the United States Postal Service. Although the PRA removed postal employees from the competitive civil service, 39 U.S.C. § 1001, it provided that they would continue to be covered by the civil service retirement system, *id.* § 1005(d), and the method for computing the substitutes' annuities was not changed (see App. 6a). In July 1974 Congress amended the Civil Service Retirement Act and PRA to make the USPS liable for any unfunded liability attributable to a collective bargaining agreement or administrative action. Payments, however, were to be made over a 30-year period. P.L. 93-349, 88 Stat. 354, July 12, 1974, 5 U.S.C. §§ 8348(h)(1)-(2); 10005(d).

In 1977 the postal service undertook strenuous efforts to cause the CSC to change the method of computation to include only the substitutes' actual earnings. Following a March 11, 1977 letter from Postmaster General Bailar to Acting CSC Chairman Sheldon (J.A. 195-196) and a meeting in May, 1977 (see J.A. 27-29, 202), Deputy Postmaster General James V. P. Conway wrote a lengthy letter to Thomas A. Tinsley, Director of the CSC's Bureau of Retirement, Insurance and Occupational Health ("BRIOH") setting forth the postal service's position (J.A. 202-205).[6] This letter was supplemented by one from Mr. Bailar of November 29, 1977 to Alan K. Campbell, then the Chairman of the CSC (J.A. 206-207). In each of these communications USPS stressed that the working conditions of the substitutes had materially

---

[6] In that letter Conway stated, *inter alia*:

> If you determine that you cannot initiate an administrative change of this nature, then the Postal Service proposes to adjust its method of certifying individual retirement records. [J.A. 204]

changed in that they were no longer subject to call, according to USPS (but see p. 4 and n.2, *supra*).

On January 12, 1978, the CSC issued an unpublished Minute (Minute 7) approving USPS' proposed change in the method for computation of benefits with respect to postal employees in third-class post offices. Minute 7 reasoned that "part-time flexible employees in third-class offices were no longer considered on call" and that "such employees [are] more properly classified as part-time employees assigned to regular schedules of less than 40 hours per week * * *" (App. 47a).

Despite the limited nature of Minute 7, however, the USPS immediately began to change employment records of *all* PTF's (in first and second—as well as third-class post offices) to credit them only for their actual earnings for purposes of retirement (J.A. 36-40, 144).

USPS' unilateral expansion of Minute 7 was adopted by OPM's subordinate body when BRIOH Letter No. 10-12, dated October 16, 1978, was issued internally to claims examiners (App. 48a). In that letter, Minute 7 was extended to PTF's in first- and second-class post offices, sweeping another 100,000 employees under the ruling (J.A. 143), and this decision was made effective with respect to employees who retired on or after February 11, 1978, the effective date of Minute 7. (App. 48a-49a).

Neither APWU nor individual affected employees were given notice that OPM was considering a change in the 50-year old practice of computing retirement benefits, or given the opportunity to comment thereon. (App. 6a, 34a).

B. The Proceedings Below

On March 26, 1979, APWU and three of its members brought suit in the United States District Court for the District of Columbia against USPS, OPM and the Director of OPM for injunctive and declaratory relief,

challenging the change in the computation method as violating the Due Process Clause of the Fifth Amendment to the United States Constitution, the Postal Reorganization Act, the Civil Service Retirement Act, and the Administrative Procedure Act ("APA"). The District Court (Penn, J.) granted summary judgment to the defendants (App. 36a-46a).

The Court of Appeals affirmed. For present purposes it is necessary to describe only the Court's reasoning in holding that "OPM's present PTF annuity computation method is a proper interpretation of the [Civil Service Retirement] Act." (App. 34a). After having concluded, in agreement with the District Court, that OPM's new rule was "interpretative" and therefore exempt from the informal rule-making provisions of the APA (App. 20a-25a), the Court "review[ed] the interpretative rule to determine its consistency with the governing statute and regulations." (App. 25a). The Court recognized that the "parties have framed their discussion largely in terms of whether OPM lawfully determined that PTF's are no longer 'subject to call,' and the single disputed factual issue in this case is whether PTF's are in fact no longer 'subject to call.'" (App. 25a). However, although both OPM and BRIOH had accepted the "subject to call" standard and had adopted the new practice solely on the basis of USPS' representations that the substitutes are no longer subject to call, the Court said that the " 'subject to call' issue * * * is a mirage." (App. 26a). In the Court's view:

> "Subject to call" is not a legislatively defined category that limits OPM's interpretation of the Act; rather, it is merely an umbrella term that describes the working conditions of employees whom OPM believes Congress intended to benefit through use of an enhanced "average pay" figure.
>
> * * * *
>
> The parties' dispute over the nature of the present working conditions of PTF's and whether those

> conditions render PTF's "subject to call" is therefore immaterial. Even if appellants could prove at trial that the working conditions of PTF's have not changed over the past twenty years and that PTF's are as available as appellants claim, this proof would at most undermine OPM's justification for the change in its interpretation. It would not affect the propriety of the interpretation itself, which is a pure question of law. [App. 26a, 27a]

The Court then determined on the basis of its independent inquiry—the parties not having briefed the issue—that OPM's "new computation formula is consistent with the plain meaning of the term 'average pay' in the Civil Service Retirement Act [and] with the Act's structure and purpose." (App. 34a). In so ruling, the Court gave no deference to the Secretary of Interior's original interpretation of the Act, or to the fact that it had been adhered to by successive administrators of the retirement system and relied on by affected employees for 50 years.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IMPORTANT BECAUSE IT HAS A SEVERELY ADVERSE IMPACT ON A LARGE CLASS OF FEDERAL EMPLOYEES.

The importance of the Court of Appeals' decision cannot be gainsaid. That decision approves a change in the calculation of retirement benefits which, in the Court's words, "substantially reduced the expected annuities of some 113,000 future retirees," thereby "threaten[ing] the employees' financial planning and economic security" (App. 2a, 34a).[7] It likewise affects an undetermined num-

---

[7] The precise impact of the change in the annuity formula will, of course, vary from employee to employee. But the record does give some indications of its magnitude. The District Court found that the annuity of Wilma M. Carter is cut from $412 per month to $251 per month (App. 39a-40a). Dorothy H. Swanson's annuity will be reduced from an anticipated $565 per month to $385 per month (J.A. 170-173). Jane E. Sheets' retirement "will amount to one-fourth of what it would have been" (J.A. 152A).

ber of employees in the Forest Service and elsewhere in government service who, as a high-level OPM official deposed, are similarly situated (J.A. 49-50). Moreover, because the decision admonishes government employees that administrative or federal action may upset retirement expectancies, no matter how firmly grounded in long-established practice, it jeopardizes a major objective of the retirement system—to attract and retain workers in federal service despite the monetary inducements offered by private employers (see p. 21, *infra*).

II. THE DECISION BELOW IS INCONSISTENT WITH DECISIONS OF THIS COURT ESTABLISHING FUNDAMENTAL PRINCIPLES CONCERNING THE RELATIONSHIP BETWEEN THE ADMINISTRATIVE AGENCIES AND THE FEDERAL COURTS.

The serious adverse consequences to the many employees whom the decision below directly affects are the product of an opinion that contravenes two major principles of administrative law established by this Court. As we now show, the decision below (a) violates the proper relationship between administrative agencies and reviewing courts as set forth in *SEC v. Chenery Corp.*, 318 U.S. 80; 332 U.S. 194, and (b) gives no weight to the civil service agencies' 50-year old interpretation of the Retirement Act, contrary to the teachings of *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, and its progeny.

A. The Decision Below Is Inconsistent With *SEC v. Chenery Corp.*, 318 U.S. 80; 332 U.S. 194.

In *SEC v. Chenery Corp.*, 318 U.S. 80 (*"Chenery I"*), this Court "emphasized a simple but fundamental rule of law" (*SEC v. Chenery Corp.*, 332 U.S. 194, 196) (*"Chenery II"*). As reaffirmed in the latter case:

> That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make,

> must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency. [332 U.S. at 196]

The court below in this case honored the *Chenery* principle in the breach rather than in the observance. OPM (and BRIOH) adopted a new formula for computing the annuities for postal substitutes solely on the basis that due to changed circumstances they were no longer "subject to call". Yet the Court of Appeals, without passing on the merits of that rationale, affirmed the agency decision on the ground that, under the court's own interpretation of the Retirement Act, the new formula was correct whether or not the substitutes are in fact "subject to call". See pp. 8-9, *supra* and pp. 16-17, *infra*.

The Court of Appeals sought to justify its nonadherence to the requirements of *Chenery* on the basis that the doctrine does not apply to interpretative rules:

> In contrast to agency decisions made pursuant to adjudication and legislative rulemaking, interpretative rules may be sustained on grounds other than those assigned by the agency. [App. 26a]

This was error. The Court of Appeals' limitation is not only unprecedented but unprincipled. For this Court has *not* excluded interpretative rules from the *Chenery* doctrine. And it is *not* for a lower court to do so in the first instance.[8] It would therefore be inappropriate,

---

[8] The Court of Appeals' only citation was, "*See* K. Davis, *Administrative Law Text*, § 16:07, at 329 (3d ed. 1972)" (App. 26a). It bespeaks no disrespect for academic scholarship to recognize that a treatise lacks the authority of a precedent in this Court. Moreover, in the cited section Professor Davis does not discuss interpretative

within the confines of a petition for certiorari, to do more than show, as can readily be done, that the distinction between interpretative rules and other agency decisions, though unquestionably significant for many purposes, is entirely irrelevant in the present context.

Under the APA the notice and comment requirement of legislative rulemaking is not applicable to interpretative rulemaking (see 5 U.S.C. § 553 and especially § 553 (b)(A)); however the *Chenery* principle has nothing to do with the procedures underlying the agency's action. The two types of rules are also viewed differently for purposes of judicial review. As explained in *Batterton v. Francis*, 432 U.S. 416: Ordinarily, administrative interpretations of statutory terms are given important but not controlling weight (*id.* at 424, referring to interpretative rules), whereas legislative rules "can be set aside only if the Secretary exceeded his statutory authority or if the regulation is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"

(or for that matter legislative) rulemaking. The particular passage to which the court refers appears to be the following:

> [The *Chenery*] principle does not apply to functions which courts properly perform, such as *molding law, interpreting statutes*, interpreting findings, deciding whether findings are supported by substantial evidence, deciding whether the findings sufficiently support the order, determining the overall reasonableness of the action taken. [K. Davis, *op. cit. supra* at 329, emphasis added]

Professor Davis cited no decisions in support of this gloss on *Chenery*. If it was intended as a listing of "functions" to which the *Chenery* principle is wholly inapplicable (as the Court of Appeals appears to have thought), this limitation cuts far too deeply. The issue remanded in *Chenery I* required the SEC to "mold[] law" and interpret a statute, *viz.* the Public Utility Holding Company Act, although the agency's determination of that issue was, of course, subject to judicial review, which was undertaken in *Chenery II*. Thus, *Chenery* necessarily applies to "functions which the courts properly perform"; the doctrine requires that the agency have the first say but not that the agency have the final say, with respect to issues which the doctrine requires to be remanded for agency consideration.

5 U.S.C. §§ 706(a)(A), (C), (*id.* at 426). The important weight given interpretative rules respects the agency's responsibility and experience in administering the statute, which provides the agency with insight into the statute's meaning and the practical consequences of alternative constructions. The same is true with respect to interpretations rendered in the course of administrative adjudication; these likewise are entitled to "considerable deference" but do not bind the courts. *See, e.g., Bureau of Alcohol, Etc. v. Federal Labor Relations Auth.*, —— U.S. ——, 52 L.W. 4013, 4015 (Nov. 29, 1983). *Chenery* was itself an instance of adjudication, and its doctrine indisputably applies to this class of administrative decisions, as the court below indeed acknowledged. There is no rational basis for requiring that the agency be given the initial opportunity to interpret a statute in such a proceeding, and for not requiring that opportunity where the agency has determined the rights of parties by way of interpretative rule rather than formal adjudication.

By engrafting a novel exception to the *Chenery* doctrine the Court of Appeals has assumed the power, denied it by *Chenery*, to decide this case on a ground different from and inconsistent with that adopted by the agency to which Congress gave responsibility for administering the Retirement Act. Such a major revision of what this Court has repeatedly held to be the proper relationship between administrative agencies and appellate courts plainly warrants review by this Court.

B. The Decision Below Is Inconsistent With *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, and Its Progeny.

1. Having determined, notwithstanding *Chenery*, to consider the OPM's new computation method on a ground entirely different from that on which the agency rested, the Court of Appeals compounded its error by substituting its own views of what the Civil Service Retirement

Act means for the 50-year old uniform construction placed on that Act by the responsible agencies. The decision below thereby contravened this Court's oft-repeated teaching "that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful." *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315. Because the "subject to call" practice is so longstanding, *Bankamerica Corp. v. United States*, —— U.S. ——, 103 S.Ct. 2266 ("*Bankamerica*"), decided June 8, 1983, after the opinion below issued, provides an especially instructive application of this principle.

It will be recalled that in *Bankamerica* the question presented was whether § 8 of the Clayton Act bars interlocking directorates between a bank and a competing insurance company. In answering this question in the negative, contrary to the position of the United States, the Court placed special reliance on the circumstances that no action to enforce § 8 against such interlocks had been taken in over 60 years after the Clayton Act became law. This Court said:

> In rejecting the Government's present interpretation of Section 8, we by no means depart from our long-held policy of giving great weight to the contemporaneous interpretation of a challenged statute by an agency charged with its enforcement, *e.g.*, *Edwards' Lessee v. Darby*, 25 U.S. (12 Wheat.) 206, 210, 6 L.Ed. 603 (1827). But the Government does not come to this case with a consistent history of enforcing or attempting to enforce Section 8 in accord with what it urges now. On the contrary, for over 60 years, the Government made no attempt, either by filing suit or by seeking voluntary resignations, to apply Section 8 to interlocks between banks and nonbanking corporations, even though interlocking directorates between banks and insurance companies were widespread and a matter of public record

> throughout the period. We find it difficult to believe that the Department of Justice and the Federal Trade Commission, which share authority for enforcement of the Clayton Act, and the Congress, which oversees those agencies, would have overlooked or ignored the pervasive and open practice of interlocking directorates between banks and insurance companies had it been thought contrary to the law. [103 S.Ct. at 2271-2272, footnotes omitted]

Considering the Retirement Act in light of *Bankamerica*, it is especially significant that not only the OPM and its predecessors, but also USPS and the Post Office Department had recognized that the substitutes' annuities were to be determined on the basis of their average annual salary rate because they were subject to call. Postmaster General Summerfield's abortive 1960 request that the CSC revise the computation formula, and USPS' diligent and all-too-successful 1977 effort, demonstrate that the postal authorities were strongly motivated to urge a reinterpretation of the Retirement Act which would achieve that result if they could plausibly do so. Given their interest and resources, their failure even to contend that it is irrelevant whether the substitutes are subject to call confirms the soundness of the original construction of the Act, even as the failure of the antitrust enforcement authorities to invoke § 8 was of great significance in construing that provision. As the Court explained in *Bankamerica*:

> "[J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." [103 S.Ct. at 2272, quoting *FTC v. Bunte Brothers, Inc.*, 312 U.S. 349, 352]

Moreover, in *Bankamerica*, the Court was impressed by the fact "that for more than a half century literally thousands of citizens in the business world have served

as directors of both banks and insurance companies in reliance on what was universally perceived as plain statutory language." (103 S.Ct. at 2272-2273). For an almost equal period well in excess of a hundred thousand citizens accepted employment as postal substitutes though they were not paid for time spent waiting to be called for work; they did so in reliance on the government's unquestioned practice of computing their retirement annuities on the basis of their average annual rate of pay rather than their actual earnings.

"These citizens were reassured" (*id.* at 2273) by the fact that thousands of postal substitutes similarly situated had received and were receiving retirement benefits in accordance with this formula. Without deprecating in the slightest the interest of bank and insurance company directors in avoiding potential civil liability under the antitrust laws for conduct which was presumably lawful in light of the government's inaction (*id.*), we submit that the postal substitutes' reliance throughout their working lives that their retirement benefits would not be reduced by a novel statutory construction is worthy of at least equal respect. The Court of Appeals should not have transformed these employees' retirement expectancies into a teasing illusion by dismissing the long-settled understanding of the Retirement Act as "a mirage." (App. 26a). "Not lightly vacated is the verdict of quiescent years." *Coler v. Corn Exchange Bank*, 250 N.Y. 136, 141, 164 N.E. 882, 884 (Cardozo, J.), *aff'd*, 280 U.S. 218.

2. The Court of Appeals went astray at the very outset of its analysis when it stated that "In essence we are faced with a choice between two conflicting interpretations of the Act made by the agency charged with its administration." (App. 27a). Although the result which OPM reached conflicts with the prior practice, the agency adhered to the prior *interpretation* of the Retirement Act. As already discussed (pp. 7, 8, *supra*), OPM

adopted the new method of computation not because it had discarded the established "subject to call" standard, but because it determined (on the basis of USPS' representations) that the substitutes were no longer subject to call. What had changed was not OPM's interpretation of the law, but its perception of the facts.[9]

In setting the two assertedly conflicting interpretations of the Act against each other, and thereupon giving no weight to either in determining what the statute means (App. 27a), the court below erred. The premise from which it should have proceeded is that the agencies' interpretation of the statute—that is, of the legal standard it establishes—has been uniform and longstanding, and as such is entitled to great weight. The utility of the *Norwegian Nitrogen* principle will be severely diminished if any difference in outcome—no matter what the responsible agency's reasons therefor may be—is treated as a change in statutory interpretation by that agency.

The court further denigrated the *Norwegian Nitrogen* principle by dismissing it on the assumption that the Secretary of Interior's original computation formula was not "contemporaneous" with the Civil Service Retirement Act. (App. 27a-28a, n.9). "[C]onsistent and generally unchallenged practice" is entitled to deference whenever rendered. See 288 U.S. at 315, quoted at p. 14, *supra*. Justice Cardozo added that a "practice has *peculiar* weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." (288 U.S. at 315, emphasis added.) Indeed, the Secretary's original formula *is* entitled to that "peculiar weight": "contemporaneous" does not mean

---

[9] It was precisely for this reason that the parties in the Court of Appeals "framed their discussions largely in terms of whether OPM lawfully determined that PTF's are no longer 'subject to call,' and the single disputed factual issue in this case [was] whether PTF's are in fact no longer 'subject to call.'" (App. 25a).

"instantaneous", and even under the Court of Appeals' assumption, he adopted the formula in 1928, two years after the amendment to the Act which provided that postal substitutes should receive service credit as if they worked fulltime.[10]

3. Appropriate deference to consistent and generally unchallenged administrative practice does not, of course, require judicial acceptance where the statutory language or other legislative materials point unmistakably to a contrary interpretation. But no such clear guidance is provided by the indicia of Congressional intent relied on by the Court of Appeals.

According to the court below, the "plain language of the Act makes it clear that Congress did not intend for a PTF's 'average pay' to include pay which the PTF

---

[10] The court speculated that the Secretary's action was based on a Comptroller General opinion construing the statutory limitation on double compensation of government employees as it affected postal substitutes (App. 27a-28a, n.9; *id.* 5a, 7a, 22a). The court apparently overlooked the Secretary's own published 1926 decision concerning service credit for postal substitutes which is nowhere mentioned in the court's opinion. In its August 4, 1977 letter to BRIOH, see p. 6, *supra*, where it obviously sought to put its position in the best possible light, USPS expressed the belief that the Secretary's action was based "on the principle that an employee who received credit for salary as if fulltime [under the 1926 amendment], should receive credit for salary in the same manner" (J.A. 202-203). USPS added: "In addition, consideration may have been given to the theory expressed by the Comptroller General * * * that a postal substitute's per annum rate was to be determined by multiplying the hourly rate by the number of hours in a service year." (J.A. 203, footnote omitted). While the court found no justification for reliance on that decision, we submit that it would not detract from the soundness of the Secretary's action even if he did take the Comptroller's decision into account by harmonizing the treatment of postal substitutes' salaries under the two statutes. It would indeed have been harsh—and contrary to the spirit of the 1926 amendment—to utilize the per annum earnings rate for purposes of the double compensation prohibition, thereby reducing the amount which the substitutes could lawfully earn, and yet use actual earnings as the basis for calculating their retirement benefits.

never earned—neither on the basis of the employee's being 'subject to call' nor on any other basis." (App. 28a-29a). This meaning has not been so clear to those who have previously dealt with this language, and we submit that the Court of Appeals' certitude was entirely unjustified. The key to the matter is that "average pay", which is the basis for computing the annuity (5 U.S.C. § 8339(a) (1976)), is defined as "the largest annual *rate* resulting from averaging an employee's or Member's *rates of basic pay* in effect over any 3 consecutive years of creditable service." 5 U.S.C. § 8331(4) (1976) (emphasis added). A "rate" of pay is that pay which an employee is entitled to receive over a specified period of time (for example, a year) if he works during the entire period; it is not necessarily the amount of pay he actually receives.[11] Although the Court of Appeals attached great, if not decisive importance to the elaborately demonstrated proposition that "basic pay" means "pay actually earned" and "money actually received" (App. 29a-30a), this is quite beside the point, since the statute provides that annuities are to be calculated according to the employees' "rates of base pay." In short, the "plain language of the Act" (App. 28a) does not require the Court of Appeals' construction, and therefore cannot justify overturning the longstanding administrative interpretation.

Two of the further indicia on which the court relied are, at best, sufficiently debatable that they do not war-

---

[11] In discussing the computation of annuities, OPM's Federal Personnel Manual states:

> d. Basic pay rate to be used. (1) *In general.* In computing a high-3 average pay, the rate of annual basic pay—not the pay actually received by the employee—is to be used except where noted below. The basic pay rate is that fixed by applicable law or regulation. [Federal Personnel Manual, 831-1 Inst. 31 (Sept. 21, 1981) p. 60]

The exclusions from basic pay "noted below" are certain pay differentials and allowances not relevant here.

rant disregard of the agency's construction.[12] And one of the court's points is plainly without merit because it seriously misconceives the purposes of the latest major revisions of the Retirement Act, in 1956: The court asserted that because the original method provides some postal substitutes with retirement annuities greater than their earnings, it subverted the Congressional intent. The court observed that "one of the primary purposes of the retirement act is to encourage workers to remain in the federal service." (App. 32a). Senator Johnston of South Carolina, the Chairman of the Post Office and Civil Service Committee, and manager of the bill which became the

---

[12] The court inferred from the fact that the Act makes special provision for postal substitutes with respect to service credits, but not with respect to the earnings component, that Congress intended their annuities to be calculated only on the basis of actual earnings (App. 31a). While this is a plausible inference, it was likewise plausible for the Secretary of Interior to reason, as he apparently did, that Congress' intent to provide meaningful retirement benefits to "substitutes who had to remain at the post office all day awaiting work" (*id.*) would be better served if their annuity did not depend on how much work they actually obtained. The *Norwegian Nitrogen* principle recognizes that an administrator charged with implementing a new statute is in a far better position to make such a judgment concerning Congressional intent than is a court viewing a blank legislative record, decades later.

The court below derived from Congress' concern about the costs of the retirement system and its adoption of a "*partially* contributory system" (*id.*, emphasis added) a "principle" of "proportionality between employees' contributions and retirement benefits" (App. 31a-32a). But while the system embodies a certain element of "proportionality" between employees' contributions and benefits, it is far from pervasive. 5 U.S.C. § 8339 provides that the annuity is to be calculated by averaging the employee's three highest years, thereby *disregarding* the amount of the employee's earning during the other years of his credited service, and does not rely on his contributions as such at any time. The fact that the agencies responsible for the financial integrity of the retirement fund accepted the "pre-1978 method of [postal substitutes'] annuity compensation" for fifty years evidences their disagreement with the court's view that this method "violates the basic principle underlying the Act." (App. 32a).

1956 revisions of the Act, made clear that Congress' objective was "to encourage workers to remain in the federal service" *rather than to transfer to private employment.*[13] That policy can only be subverted by the demoralizing effect of the decision below on present and potential civil service employees: they will learn from what has happened to these 113,000 postal substitutes that retirement expectations, based on historic practice, can be dashed by administrative or judicial action.[14] Senator Johnston's explanation demonstrates also that one of the ends which Congress sought to achieve by improving retirement benefits in the 1956 revision was to induce

---

[13] Senator Johnston said, in the passage cited by the Court:

> If the bill should be passed and enacted into law it will, in my opinion, mean much to the Federal Government and employees who work for the Federal Government, because it will provide a greater incentive for Government employees to remain in Government service. One thing that has hindered the departments in the past has been that after a person has entered the Government service, and has just about become familiar with the duties of his office, he has started looking around for greener fields. We think that a better retirement system will deter so many employees from leaving. [102 Cong. Rec. 8657 (1956)]

Earlier, Senator Johnston had said:

> Deficiencies and inequities in present law have been cited by management and employees as one of the reasons for the high separation rate of career personnel. The failure of the Government to keep pace with industry in retirement matters has been given as one of the reasons why it has become so difficult to attract scientists, engineers, doctors, nurses, and other classes of professional and skilled personnel needed to staff and efficiently and economically perform a multitude of Federal services. [102 Cong. Rec. 8548 (1956)]

[14] While Congress appears to have constitutional power to reduce unvested retirement benefits by legislation, it would presumably not do so without giving full consideration to the equities of the immediately affected individuals and to the potentially demoralizing effect on federal employees generally.

some employees to choose early retirement, rather than to discourage them from doing so, as the court opined.[15]

When the flaws in the Court of Appeals' reasoning are considered it becomes apparent, at the least, that the court was entirely unjustified in rejecting the civil service agencies' established "subject to call" standard as an incorrect interpretation of the annuity computation of the Retirement Act. "To sustain the [agency's] application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Comm'n v. Aragon*, 329 U.S. 143, 153, quoted in, *e.g.*, *Udall v. Tallman*, 380 U.S. 1, 16, *American Paper Institute v. American Electric Power Service Corp.*, —— U.S. ——, 103 S.Ct. 1921, 1932 (May 19, 1983).

---

[15] Senator Johnston said:

> The cost of the bill, if enacted, will prove to be a sound investment, from which Uncle Sam will receive handsome dividends in the years to come. It will also induce some employees to retire a little sooner than they would otherwise retire; and, at the same time, the bill would take up a certain amount of slack in unemployment at the present time. [102 Cong. Rec. 8550 (1956)]

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DARRYL J. ANDERSON
ANTON G. HAJJAR
SUSAN L. CATLER
O'DONNELL & SCHWARTZ
1126 - 16th Street, N.W.
Washington, D.C. 20036
(202) 887-5955

GEORGE KAUFMANN
(Counsel of Record)
2101 L Street, N.W.
Washington, D.C. 20037
(202) 296-1294

Attorneys for Petitioner

STATUTORY APPENDIX

STATUTE INVOLVED

5 U.S.C. §§ 8331 *et seq.*

SUBCHAPTER III—CIVIL SERVICE RETIREMENT

§ 8331. Definitions

For the purpose of this subchapter—

(1) "employee" means—

(A) an employee as defined by section 2105 of this title;

* * * *

(3) "basic pay" includes—

(A) the amount a Member received from April 1, 1954, to February 28, 1955, as expense allowance under section 601(b) of the Legislative Reorganization Act of 1946 (60 Stat. 850), as amended; and that amount from January 3, 1953, to March 31, 1954, if deposit is made therefor as provided by section 8334 of this title;

(B) additional pay provided by—

(i) subsection (a) of section 60e-7 of title 2 and the provisions of law referred to by that subsection; and

(ii) sections 60e-8, 60e-9, 60e-10, 60e-11, 60e-12, 60e-13, and 60e-14 of title 2;

(C) premium pay under section 5545(c)(1) of this title; and

(D) with respect to a law enforcement officer, premium pay under section 5545(c)(2) of this title;

but does not include bonuses, allowances, overtime pay, military pay, pay given in addition to the base pay of the position as fixed by law or regulation

except as provided by subparagraphs (B), (C), and (D) of this paragraph, retroactive pay under section 5344 of this title in the case of a retired or deceased employee, uniform allowances under section 5901 of this title, or lump-sum leave payments under subchapter VI of chapter 55 of this title. For an employee paid on a fee basis, the maximum amount of basic pay which may be used is $10,000;

(4) "average pay" means the largest annual rate resulting from averaging an employee's or Member's rates of basic pay in effect over any 3 consecutive years of creditable service or, in the case of an annuity under subsection (d) or (e)(1) of section 8341 of this title based on service of less than 3 years, over the total service, with each rate weighted by the time it was in effect;

• • • •

§ 8332. Creditable service

(a) The total service of an employee or Member is the full years and twelfth parts thereof, excluding from the aggregate the fractional part of a month, if any.

(b) The service of an employee shall be credited from the date of original employment to the date of separation on which title to annuity is based in the civilian service of the Government. Credit may not be allowed for a period of separation from the service in excess of 3 calendar days. The service includes—

(1) employment as a substitute in the postal field service;

• • • •

§ 8334. Deductions, contributions, and deposits

(a)(1) The employing agency shall deduct and withhold 7 percent of the basic pay of an employee, 7½ per-

cent of the basic pay of a Congressional employee, a law enforcement officer, and a firefighter, and 8 percent of the basic pay of a Member. An equal amount shall be contributed from the appropriation or fund used to pay the employee or, in the case of an elected official, from an appropriation or fund available for payment of other salaries of the same office or establishment. When an employee in the legislative branch is paid by the Clerk of the House of Representatives, the Clerk may pay from the contingent fund of the House the contribution that otherwise would be contributed from the appropriation or fund used to pay the employee.

(2) The amounts so deducted and withheld, together with the amounts so contributed, shall be deposited in the Treasury of the United States to the credit of the Fund under such procedures as the Comptroller General of the United States may prescribe. Deposits made by an employee or Member also shall be credited to the Fund.

(b) Each employee or Member is deemed to consent and agree to these deductions from basic pay. Notwithstanding any law or regulation affecting the pay of an employee or Member, payment less these deductions is a full and complete discharge and acquittance of all claims and demands for regular services during the period covered by the payment, except the right to the benefits to which the employee or Member is entitled under this subchapter.

• • • •

§ 8339. Computation of annuity

(a) Except as otherwise provided by this section, the annuity of an employee retiring under this subchapter is—

(1) 1½ percent of his average pay multiplied by so much of his total service as does not exceed 5 years; plus

(2) 1¾ percent of his average pay multiplied by so much of his total service as exceeds 5 years but does not exceed 10 years; plus

(3) 2 percent of his average pay multiplied by so much of his total service as exceeds 10 years.

However, when it results in a larger annuity, 1 percent of his average pay plus $25 is substituted for the percentage specified by paragraph (1), (2), or (3) of this subsection, or any combination thereof.

• • • •

(f) The annuity computed under subsections (a)-(e) and (o) of this section may not exceed 80 percent of—

(1) the average pay of the employee; • • •

• • • •

§ 8347. Administration; regulations

(a) The Office of Personnel Management shall administer this subchapter. Except as otherwise specifically provided herein, the Office shall perform, or cause to be performed, such acts and prescribe such regulations as are necessary and proper to carry out this subchapter.

• • • •